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9 and all others similarly situated*

10 **UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION**

13 ARAM HOVSEPIAN, individually
14 and on behalf of all others similarly
15 situated,

16 Plaintiff,
17 v.
18 APPLE, INC.,
19 Defendant.

20 Case No.: 08-cv-05788 JF

21 CLASS ACTION

22 **MEMORANDUM OF POINTS
23 AND AUTHORITIES IN
24 SUPPORT OF PLAINTIFF'S
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

25 Judge: Jeremy Fogel
Courtroom: 3 - 5th floor
Hearing Time: 9:00 a.m.
Hearing Date: July 24, 2009

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1 Although Apple spends thirteen pages stating its point in different ways, it's
 2 motion to dismiss under FRCP 12(b)(6) is almost entirely directed at whether
 3 Apple had a duty to disclose the defect in its iMac computer screens – a defect
 4 which causes vertical lines to distort and obscure screen images and which
 5 typically manifests itself after the one year express warranty has expired. In
 6 making its arguments, Defendant Apple simply ignores wide swaths of Plaintiff's
 7 Amended Complaint which clearly and with specificity establish that Apple had a
 8 duty to disclose the vertical line screen defect because: (1) Apple had exclusive
 9 knowledge of the defect and the timing of its manifestation; and (2) because Apple
 10 actively concealed and in fact continues to actively conceal the defect by denying
 11 its existence to this day. Apple does not argue that any particular paragraph of the
 12 complaint is not well-plead, and given that the facts of the Amended Complaint
 13 must be taken as true with all favorable inferences drawn in Plaintiff's favor,
 14 Apple's motion should be denied.

15 **I. FACTUAL BACKGROUND.**

16 Plaintiff is a purchaser of an Apple iMac computer that manifested the
 17 vertical line defect which progressively obscured more and more of the screen,
 18 rendering the computer unuseable. As plead in the SAC, this is not an isolated
 19 incident, as there are now literally thousands of reports of similar problems.

20 Numerous portions of the Amended Complaint provide the basis for Apple's
 21 duty to disclose the vertical screen line defect including:

22 • Apple knows that a very high percentage of iMac display screens will
 23 develop the vertical line problem within 2-3 years of first use. Apple
 24 is exclusively aware of this because only Apple has all the data that
 reveals the depth of the problem. Apple does not make public the

1 number of complaints it receives, nor does it disclose the number of
 2 warranty claims or repair orders it receives, let alone reveal that
 3 information by part repaired or replaced or the problem with those
 4 parts repaired or replaced. (SAC, at ¶23);

- 5 • Apple, the designer of the screen and the components that interact
 6 with the screen, has exclusive knowledge of the design or equipment
 7 characteristics that cause the defect. (SAC, at ¶27);
- 8 • Apple has failed to take corrective action with regard to the Defect.
 9 Instead, Apple has responded by uniformly denying, on its website
 10 and in its retail stores, customer complaints and has sought to “run out
 11 the clock” on the warranties that accompanied the iMac. (SAC, at
 12 ¶31);
- 13 • Apple had a duty to disclose material facts regarding the Defect
 14 alleged here for the additional reasons:
 - a. Apple had exclusive knowledge of the Defect at the time of
 15 sale. The Defect, while obvious to an expert engineer, is latent and not
 16 something that a Plaintiff or Class members could, in the exercise of
 17 reasonable diligence, have discovered independently prior to
 18 purchase.
 - b. Apple undertook active steps to conceal it. There is nothing in
 19 Apple’s advertising or marketing materials that discloses the truth
 20 about the Defect, despite ample evidence that Apple is aware of the
 21 problem by virtue of, nothing else, thousands and thousands of
 22 consumer complaints on the Internet and on Apple’s own web site.
 23 Apple has at all times denied the existence of any Defect in the iMac.

15
 16 These averments, each of which must be taken as true at this stage of the
 17 proceedings, more than adequately put Apple on notice of the gravamen of
 18 Plaintiff’s claim.

19 **II. THE SECOND AMENDED COMPLAINT STATES A CLAIM
 20 UNDER THE UCL AND CLRA.**

21 Much ink has been wasted briefing the standards under which a Rule 12
 22 motion must be judged in light of the Supreme Court’s decision in *Bell Atlantic*
 23 *Corp. v. Twombly*, 550 U.S. 544, (2007). But as a Court in this District recently

1 observed:

2 In *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081
 3 (2007) (per curiam), decided two weeks after *Twombly*, the Court
 4 clarified that *Twombly* did not signal a switch to fact-pleading in the
 5 federal courts. *Erickson* reaffirms that under Rule 8 “[s]pecific facts
 6 are not necessary; the statement need only ‘give the defendant fair
 7 notice of what the ... claim is and the grounds upon which it rests.’”
 8 127 S.Ct. at 2200, quoting *Twombly*, 127 S.Ct. at 1964. In the wake of
 9 *Twombly* and *Erickson*, the Seventh Circuit clarifies the amount of
 10 detail that is required by Rule 8(a) and, thus, the detail required for a
 11 claim to survive a motion to dismiss: “[t]aking *Erickson* and *Twombly*
 12 together, we understand the Court to be saying only that at some point
 13 the factual detail in a complaint may be so sketchy that the complaint
 14 does not provide the type of notice of the claim to which the
 15 defendant is entitled under Rule 8.” *Airborne Beepers & Video, Inc. v.*
 16 *AT & T Mobility LLC*, 499 F.3d 663, 667-668 (7th Cir.2007). . . . the
 17 Court notes the parties' respective arguments about the proper
 18 standard for a motion to dismiss after the Supreme Court's opinion in
 19 *Twombly*. *In spite of arguments to the contrary, the pleading standard*
 20 *under the Federal Rules of Civil Procedure is unchanged and, so too,*
 21 *the 12(b)(6) standard.*

22 *Villegas v. J.P. Morgan Chase & Co.*, 2009 WL 605833 at *2-3 (N.D.Cal. March
 23 09, 2009) (emphasis added). Thus, it remains the case that a complaint passes rule
 24 muster when it puts the defendant on notice of the claims against it and includes
 1 some plausible factual averments beyond mere recitation of legal elements. *Id.* at
 2 *3 (“By requiring plausibility on the face of the complaint, the Supreme Court was
 3 not re-writing Rule 8(a)(2)'s requirement of a short and plain statement. Rule 8(a)
 4 does not require a claimant to set out in detail the facts upon which his or her claim
 5 is based, however, something more than a blanket assertion of entitlement of relief
 6 is required. Rule 8(a) requires a claimant to provide ‘fair notice’ of the nature of
 7 the claim and the “‘grounds upon which it rests.’”). It is also still the case that,

1 “[f]or purposes of such a motion, the complaint is construed in the light most
2 favorable to the plaintiff and all properly pleaded factual allegations are taken as
3 true” and that “All reasonable inferences are to be drawn in favor of the plaintiff.”
4 *Stoehr v. UBS Securities, LLC*, 2008 WL 2705575 at *2 (N.D.Cal. July 10, 2008).

5 Nor is the characterization of the heightened pleading standard for fraud
6 claims under F.R.C.P. 9(b) as severe as Apple claims. Apple ignores that, for the
7 most part, this is a case that is based on Apple’s fraudulent omission of material
8 facts. “Clearly, a plaintiff in a fraud by omission suit will not be able to specify the
9 time, place, and specific content of an omission as precisely as would a plaintiff in
10 a false representation claim. Another judge in this district has recognized that “a
11 fraud by omission claim can succeed without the same level of specificity required
12 by a normal fraud claim.” *Falk v. General Motors Corp.*, 496 F.Supp.2d 1088,
13 1098-99 (N.D.Cal. 2007). *See also Washington v. Baenziger*, 673 F.Supp. 1478,
14 1482 (N.D.Cal.1987) (Weigel, J.) (“Where the fraud consists of omissions on the
15 part of the defendants, the plaintiff may find alternative ways to plead the
16 particular circumstances of the fraud. [F]or example, a plaintiff cannot plead either
17 the specific time of the omission or the place, as he is not alleging an act, but a
18 failure to act.”) (internal citations and quotations omitted); *Zwicker v. General*
19 *Motors Corp.*, 2007 WL 5309204 at *4 (W.D.Wash. July 26, 2007) (defendant
20 “overstates Rule 9(b)’s requirements in fraudulent omission cases. . . . This Court
21 finds the reasoning of Falk on the exact issue before this Court persuasive and
22 finds the reasoning of Falk on the exact issue before this Court persuasive and
23 finds the reasoning of Falk on the exact issue before this Court persuasive and
24 finds the reasoning of Falk on the exact issue before this Court persuasive and

1 holds that the heightened pleading requirement is relaxed in cases of fraudulent
 2 omissions.”).

3 Finally, in the specific context of a UCL claim, the California courts and
 4 legislature have made clear that an even more relaxed pleading standard is
 5 required:

6 When an unfair-competition claim is based on an alleged fraudulent
 7 business practice—that is, a practice likely to deceive a reasonable
 8 consumer—“a plaintiff need not plead the exact language of every
 9 deceptive statement; it is sufficient for [the] plaintiff to describe a
 scheme to mislead customers, and allege that each misrepresentation
 to each customer conforms to that scheme.”

10 *Hunter v. General Motors Corp.*, 2007 WL 4100084 at * 11 (Cal. App. 2 Dist.
 11 November 19, 2007) (quoting *Committee on Children's Television, Inc. v. General*
 12 *Foods Corp.*, 35 Cal.3d 197, 212-213 (1983)).

13 Judged against these standards, it is clear that Plaintiff’s complaint
 14 adequately states claims against Apple that should be tested in discovery.

15 **A. THE SAC STATES A CLAIM FOR MISREPRESENTATION BY
 16 OMISSION AS A RESULT OF APPLE’S DUTY TO DISCLOSE.**

17 It is black letter law that a Plaintiff can state a claim for fraudulent omission
 18 under California law by alleging that a defendant has a duty to disclose, which can
 19 be established by proving at least one of the following four circumstances:

20 (1) when the defendant is in a fiduciary relationship with the plaintiff;
 21 (2) when the defendant had exclusive knowledge of material facts not
 22 known to the plaintiff; (3) when the defendant actively conceals a
 material fact from the plaintiff; and (4) when the defendant makes
 partial representations but also suppresses some material fact.

23 *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 337 (1997). As stated in the SAC,

1 Apple has a duty to disclose by virtue of the second and third circumstances.¹

2

3 **1. APPLE HAS A DUTY TO DISCLOSE THE VERTICAL**
LINE DEFECT BECAUSE IT HAS EXCLUSIVE
KNOWLEDGE OF MATERIALS FACTS NOT KNOWN TO
PLAINTIFF

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5 The SAC sets forth several specific facts, which taken as true as they must be at
 6 this stage, establish Apple's duty to disclose as a result of its exclusive knowledge
 7 of material facts. These facts include:

8

- 9 • Apple knows that a very high percentage of iMac display screens will
 develop the vertical line problem within 2-3 years of first use. Apple
 is exclusively aware of this because only Apple has all the data that
 reveals the depth of the problem. (SAC, at ¶23)
- 10 • Apple does not make public the number of complaints it receives, nor
 does it disclose the number of warranty claims or repair orders it
 receives, let alone reveal that information by part repaired or replaced
 or the problem with those parts repaired or replaced. (SAC, at ¶23)
- 11 • Apple, the designer of the screen and the components that interact
 with the screen, has exclusive knowledge of the design or equipment
 characteristics that cause the defect. (SAC, at ¶27)
- 12 • The Defect, while obvious to an expert engineer, is latent and not
 something that a Plaintiff or Class members could, in the exercise of
 reasonable diligence, have discovered independently prior to
 purchase.

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14 The facts set forth above are of the type that courts have found adequate to
 15 state a claim. For example, in a case directly on point, the court in *Falk v. General*
 16 *Motors Corp.*, 496 F. Supp.2d 1088 (N.D. Cal. 2007) found a duty to disclose and
 17 thus fraudulent concealment on the part of GM because of its exclusive knowledge

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24 ¹ The existence of a duty to disclose establishes not only a violation of the CLRA but also the
 unlawful and unfair prongs of the UCL. Apple's argument that the unlawful and unfair prongs
 have not been met is entirely predicated on a lack of a duty to disclose. (See Apple Motion to
 Dismiss, at 7-9)

1 of a speedometer failure defect:

2 Plaintiffs allege that GM had exclusive knowledge of the putative
 3 defect in their speedometers. Plaintiffs claim that “[o]nly GM had
 4 access to the aggregate data from its dealers[,] only GM had access to
 5 pre-release testing data[, and] only GM had access to the numerous
 6 complaints from its customers.” When accepted as true for the
 7 purposes of this Rule 12(b)(6) motion, plaintiffs' material allegations
 8 suffice to state a claim that GM had exclusive knowledge of the
 9 alleged defect in their speedometers. The record of complaints to GM
 10 between 2003 and 2007 show that GM was clearly aware of a problem
 11 with its speedometers; the record makes it equally clear that customers
 12 only became aware of the problem if they actually experienced it first-
 13 hand. Since, as plaintiffs argue, GM “was in a superior position to
 14 know” that its speedometers might fail, plaintiffs successfully state a
 15 CLRA claim for omission of a material fact which lay within GM's
 16 exclusive knowledge. This alone defeats GM's 12(b)(6) motion to
 17 dismiss for failure to state a claim.

18 *Id.* at 1096-97. These facts, found sufficient to state a claim on a rule 12 motion,
 19 are almost identical to the facts alleged in the instant complaint.

20 Apple's reliance on *Daugherty v. American Honda Motor Co., Inc.*, 144
 21 Cal.App.4th 824 (2006) is entirely misplaced because in *Daugherty* Honda had
 22 admitted the existence of the defect and promised to remedy it through a special
 23 extended warranty program.² The plaintiffs in *Daugherty* were trying to extend the
 24 special warranty program or include earlier model years in the program, claiming
 25 that certain people were left out of the notification program because they owned

26 _____
 27 ² *Daugherty* involved a gradual oil leak in the engines of certain 1990-1997 model-year Honda
 28 vehicles. *Id.* at 827. When Honda discovered the oil leak problem in 2000, it notified the
 29 purchasers of cars in the model years it believed were affected (those manufactured in 1994
 30 through early 1997), first offering to replace at no cost the faulty oil gasket, and later offering to
 31 include the cost of repairing damage from an oil leak caused by the faulty part. *Id.* at 828. Honda
 32 promised, through its express warranty, to “repair or replace any part that is defective in material
 33 or workmanship under normal use....” 144 Cal.App.4th at 830. The express warranty was
 34 specifically limited to “3 years or 36,000 miles, whichever comes first.” *Id.* The express
 35 warranty was Honda's only “affirmative representations at the time of sale” regarding the alleged
 36 defect. *Id.* at 836.

1 vehicles that were manufactured before 1994, and that Honda had not provided
 2 adequate notice of the program to those who were included in it. *Id.* at 827. It is
 3 difficult to argue that Honda had exclusive knowledge of the defect after Honda
 4 had admitted the existence of the defect and offered to have it remedied. Here,
 5 Apple has recalled nothing, has made no notification to any part of the class, and in
 6 facts has continued to deny the existence of the defect. This case is thus nothing
 7 like *Daugherty*.

8 Further, *Daugherty* actually supports the ability of Plaintiffs to proceed on a
 9 fraudulent omission basis so long as the factual predicate of such a claim is
 10 established. As the *Falk* court noted in discussing *Daugherty* and *Bardin v.*
 11 *DaimlerChrysler Corp.*, 136 Cal.App.4th 1255, 39 Cal.Rptr.3d 634 (2006), another
 12 case upon which Apple relies,

13 In both of these cases, the court's decision to dismiss a claim for
 14 unlawful omission rested on the lack of a duty to disclose. *Both*
Bardin and Daugherty allow CLRA claims for certain omissions,
 15 however, when the "omission [is] contrary to a representation actually
 made by the defendant, or an omission of a fact the defendant was
 16 obliged to disclose." *Daugherty*, 144 Cal.App.4th at 824, 51
 Cal.Rptr.3d 118....Plaintiffs can therefore successfully pursue a CLRA
 17 claim, despite *Daugherty* and *Bardin*, if GM was "obliged to disclose"
 the potential for problems with the speedometers in certain vehicles....

18 2007 WL 1970123 at *3-*4.

19 Apple tries to argue that it is absolved of a duty to disclose as a result of the
 20 complaints on the Internet. (Apple Motion at 8) But this is a silly argument, as it
 21 ignores (1) the averment that only Apple knows the complete universe of
 22 complaints and warranty claims (a consumer who spent hours searching the
 23 Internet might know of those complaints where the iMac owner decided to post

1 their complaint on the internet, which is presumably a small part of the whole); and
 2 (2) the complaints at most establish that others are having a similar problem, but
 3 not the existence of or cause of the defect, which only Apple knows because of its
 4 proprietary knowledge of the design and component testing and overall level of
 5 complaints and claims.

6 Indeed, the sheer number of publicly available complaints was a factor in
 7 *Plaintiff's favor* in *Falk*, as the court noted that

8 In support of their claim, plaintiffs present several pages of quotations
 9 containing Internet complaints about GM speedometers, all for
 10 vehicles sold between 2003 and 2007. The amassed weight of these
 11 complaints suggests that plaintiffs' speedometer failures were not
 12 isolated cases. Instead, when viewed in the light most favorably to the
 plaintiffs, these collected complaints suggest strongly that there was a
 defect in the design of certain GM speedometers in the years from
 2003 to 2007, which caused the speedometers to fail unexpectedly and
 without warning.

13 *Id.* at 196.

14 **2. APPLE HAS A DUTY TO DISCLOSE THE VERTICAL**
 15 **LINE DEFECT BECAUSE IT HAS ACTIVELY**
CONCEALED THE EXISTENCE OF THIS DEFECT FROM
PLAINTIFF

16 Apple also ignores the averments of the complaint that establish Apple's active
 17 concealment of the defect:

- 18 • Apple has failed to take corrective action with regard to the Defect.
 19 Instead, Apple has responded by uniformly denying, on its website
 20 and in its retail stores, customer complaints and has sought to "run out
 the clock" on the warranties that accompanied the iMac. (SAC, at
 ¶31)
- 21 • There is nothing in Apple's advertising or marketing materials that
 22 discloses the truth about the Defect, despite ample evidence that
 23 Apple is aware of the problem by virtue of, nothing else, thousands
 and thousands of consumer complaints on the Internet and on Apple's
 own web site. Apple has at all times denied the existence of any
 24 Defect in the iMac. (SAC, at ¶____)

1 These factual averments establish that Apple has *actively* concealed the problem
 2 from consumers. It has not anywhere acknowledged that there is a vertical line
 3 screen defect and it continues to deny it in the apparent face of an avalanche of
 4 consumer complaints. Indeed, it continues to deny the defect even in this
 5 litigation.

6 This easily meets the legal standard, which is that “active concealment
 7 occurs when a defendant prevents the discovery of material facts.” *Am-Mark*
 8 *Label, Inc. v. Chiang*, 2007 WL 4424952 at *9 (Cal. App. 2 Dist. December 19,
 9 2007) (citing 5 Witkin, SUMMARY OF CAL. LAW, TORTS §798 at 1155 (10th Ed.
 10 2005)). *Compare Stickrath v. Globalstar, Inc.*, 527 F. Supp.2d 992, 1000-01 (N.D.
 11 Cal. 2007) (finding that, after complaint was replead to state materiality of the
 12 omission, the following allegation likely sufficed to satisfy a duty to disclose based
 13 on active concealment: “Upon information and belief, Defendant has known of the
 14 degradation of the communications satellites and associated satellite telephone
 15 service since at least 2003, if not earlier, and has concealed from purchasers of the
 16 satellite telephone service and/or failed to alert the purchasers of the degradation of
 17 the communications satellites and associated satellite telephone service.”). Here,
 18 consumers who complained to Apple have not been told of Apple’s knowledge of
 19 the defect.

20 **B. THE SAC MEETS THE PROCEDURAL REQUIREMENTS OF**
 21 **THE CLRA**

22 Apple also tries to skirt the CLRA damage claim by asserting that the
 23 required 30 days written notice must be mailed to Apple prior to the original

1 complaint. Apple is incorrect.

2 Section 1782(d) of the California Civil Code permits a plaintiff to send
 3 written notice 30 days after the original complaint and then amend his complaint to
 4 add a damage claim to an amended complaint. This is precisely plaintiff did here.
 5 Plaintiff complied with the CLRA requirements by sending Apple a proper CLRA
 6 letter on January 16, 2009. On April 17, 2009, Plaintiff amended his complaint and
 7 added a claim for damages. Thus, Apple's procedural argument is meritless.³

8 **C. THE SAC STATES A CLAIM FOR UNJUST ENRICHMENT.**

9 Apple's unjust enrichment argument suggests that without a violation of the
 10 UCL or CLRA, there can be no unjust enrichment claim here. This is incorrect.
 11 See *Cole v. Assurion Corp.*, 2008 WL 5423859 at *13 (C.D. Cal. December 30,
 12 2008) ("Plaintiff's fraud claims form the base of her unjust enrichment claim. As
 13 the Court has found that Plaintiff's fraud claims survive this Motion, it follows that
 14 Plaintiff's unjust enrichment claim also survives the Motion.").

15 Further, a claim under the CLRA or UCL is not a prerequisite to an unjust
 16 enrichment claim. As the courts have observed, "[u]njust enrichment occurs when
 17 a party retains for itself the funds that should have been made available to another.
 18 Determining whether it is unjust for a person to retain a benefit may involve policy
 19 considerations." *Dromy Intern. Inv. Corp. v. Channel Gateway L.P.*, 2003 WL
 20 550131 at *15 (Cal. App. 2 Dist. February 27, 2003). This is particularly true
 21 where, as is the case here, Apple continued to accept the class' money with full
 22 knowledge it was selling a defective product. See *First Nationwide Savings v.*

23 ³ Further, under the CLRA, "a suit for injunctive relief may be brought without providing
 24 such notice." *Strickrath*, 527 F. Supp.2d at 1001.

1 *Perry*, 11 Cal. App. 4th 1657, 1664 (Cal. App. 6 Dist. 1992) (in considering unjust
2 enrichment claim, “restitution may be required when the person benefitting from
3 another's mistake knew about the mistake and the circumstances surrounding the
4 unjust enrichment. In other words, innocent recipients may be treated differently
5 than those persons who acquire a benefit with knowledge.”). These inherently
6 factual considerations are entirely inappropriate for determination on a motion
7 based entirely on the pleadings.

8 Finally, many of Apple's defenses to the UCL and CLRA claims are based
9 on highly technical interpretations of those statutes. Apple's defense does not say
10 it is acting properly or justly. Rather, its position is that, even if wrongful, Plaintiff
11 and the class cannot recover. This is exactly where an unjust enrichment claim
12 comes in. If Apple prevails on its readings of the UCL and CLRA (which Plaintiff
13 posits are properly plead legal claims here), the unjust enrichment count still holds
14 Apple accountable. *See Ghirardo v. Antonioli*, 14 Cal. 4th 39, 50 (1996)
15 (permitting unjust enrichment claim on case involving mistaken loan pay off even
16 though pay off did not violate any California statute).

17 Nor is unjust enrichment entirely duplicative of the UCL or CLRA here. If
18 Plaintiff is required to proceed solely on unjust enrichment grounds for damages,
19 Plaintiff would get none of the statutory benefits such as statutory attorneys fees
20 afforded by those statutes, and unjust enrichment recovery is limited by the amount
21 Apple is enriched and not by the amount Plaintiff has been damaged. *See id.* at 53.

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D. THE SAC STATES A CLAIM FOR DECLARATORY RELIEF.

Apple’s argument concerning the Declaratory Judgment Act presupposes that there is no underlying substantive claim for injunctive relief under the CLRA or UCL. Since, for the reasons stated above, Plaintiffs have stated a claim under both those statutes, Apple’s Declaratory Judgment Act arguments are inapplicable.

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